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United States
Circuit Court of Appeals

For the Ninth Circuit

E. L. COBB, as Trustee in Bankruptcy of the
CRAIG LUMBER COMPANY, a Corporation,
Bankrupt,

Appellant,

vs.

McDONALD-WEIST LOGGING COMPANY, a
Corporation,

Appellee.

BRIEF OF APPELLEE

Upon Appeal from the United States District Court
for the District of Alaska, Division No. 1.

RODEN & DAWES,

Attorneys for Appellee.

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VS.

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Appellee.

BRIEF OF APPELLEE

Upon the Craig Lumber Company being declared a bankrupt, the MacDonald Weist Logging Company filed its claim for services in getting out logs under a contract and also asked to be preferred by reason of a lien claim filed by it. The Referee in Bankruptcy entered an order allowing the claim but denying the lien and both the Trustee and claimant asked for a review and both appealed from an order of the District Court affirming the order of

the Referee. Separate transcripts have been made. The Trustee has briefed the cases together and the claimant, MacDonald Weist Logging Company, appellee herein and appellant in No. 3704, files a brief in each case.

BRIEF OF APPELLEE

Case No. 3699

Appellant seeks to reverse an order of the District Court affirming an order of the Referee in Bankruptcy allowing the claim of the appellee herein. Appellant urges that the claim of appellee is based upon a void contract and cannot be enforced. The appellee contends:

First.—That the appellant (Trustees in Bankruptcy) has lost his right to appeal from the order allowing the claim, and

Second.—That in any event, the claim is based upon a valid contract and should be allowed.

1st.—*Time for Appeal Passed.*

Upon consideration of the claim in the first instance, the Referee disallowed same and the District Court, upon review, reversed the Referee. The Trustee (appellant herein) petitioned this Court for a review (Case No. 3468 of this Court) of the ruling of the District Court and in an opinion reported in 266 Fed. at page 692, by Mr. Justice Hunt, held that the Trustee's remedy by appeal was exclusive and the time for appeal having passed, the petition was dismissed.

While the question was not decided on the merits, yet it was none the less conclusive upon the Trustee and the order of the District Court allowing the claim was final and cannot now be appealed from, the time allowed (10) days having expired.

2nd.—Claim Should Be Allowed on the Merits.

While we believe that the above is conclusive of this appeal, we also urge that the claim should be allowed on the merits.

The trustee seeks to avoid payment for services rendered the bankrupt under the contract by reason of Sections 654-660 inclusive, of the Compiled Laws of Alaska relating to the qualification of foreign corporations to do business in the Territory. Both the parties (the bankrupt and the claimant) are corporations of the State of Washington and were doing business in Alaska when the contract out of which this controversy arose was made and the services of claimant rendered.

The controlling sections of the Compiled Laws of Alaska are as follows:

“Section 654. All corporations or joint stock companies organized under the laws of the United States, or the laws of any state or territory of the United States, shall, before doing business within the District, file in the office of the Secretary of the District and in the office of the Clerk of the District Court for the division wherein they intend to carry on business, a duly authenticated copy of their char-

ter or articles of incorporation, and also a statement verified by the oath of the president and secretary of such corporation, and attested by a majority of its board of directors, showing—

“(1) The name of such corporation and the location of its principal office or place of business without the district; and, if it is to have any place of business or principal office within the district, the location thereof;

“(2) The amount of capital stock;

“(3) The amount of its capital stock actually paid in money;

“(4) The amount of its capital stock paid in any other way, and in what;

“(5) The amount of the assets of the corporation, and of what the assets consist, with the actual cash value thereof;

“(6) The liabilities of such corporation, and if any of its indebtedness is secured, how secured, and upon what property.

“Such corporation or joint stock company shall also file, at the same time and in the same offices, a certificate, under the seal of the corporation and the signature of its president, vice-president, or other acting head, and its secretary, if there be one, certifying that the corporation has consented to be sued in the courts of the district upon all causes of actions arising against it in the district, and that service of process may be made upon some person, a resident

of the district, whose name and place of residence shall be designated in such certificate, and such service, when so made upon such agent, shall be valid service on the corporation or company, and such agent shall reside at the principal place of business of such corporation or company in the district."

"Sec. 655. The written consent of the person so designated to act as such agent shall also be filed in like manner, and such designation shall remain in force until the filing in the same offices of a written revocation thereof, or of the consent, executed in like manner. A certified copy of the designation so filed, accompanied with a certificate that it has not been revoked, is presumptive evidence of the execution thereof, and conclusive evidenc of the authority of the officer executing it."

"Sec. 657. If any such corporation or company shall attempt or commence to do business in the district without having first filed said statements, certificates, and consents required by this chapter, it shall forfeit the sum of twenty-five dollars for every day it shall so neglect to file the same; *and every contract made by such corporation, or any agent or agents thereof, during the time it shall so neglect to file such statements, certificates, or consents, shall be voidable at the election of the other party thereto.* It shall be the duty of the United States Attorney for the District to sue for and recover, in the name of the United States,

the penalty above provided, and the same, when so recovered, shall be paid into the Treasury of the United States."

"Section 658. Every such foreign corporation or company shall annually and within sixty days (60), from the first day of January of each year make a report, which shall be in the same form and contain the same information as required in the statement mentioned in Section Six Hundred and Fifty-Four, Chapter Twenty-Three of the Compiled Laws of the Territory of Alaska, which report shall be filed in the office of the Secretary of the Territory of Alaska, and a duplicate thereof in the office of the Clerk of the District Court for the division of the Territory wherein the business of the corporation is carried on."

"Sec. 660. If any such corporation or company shall fail to comply with any of the provisions of this chapter, *all its contracts with citizens of the district shall be void as to the corporation or company*, and no court of the district, or of the United States, shall enforce the same in favor of the corporation or company so failing."

The contention of appellee is that it made a bona fide effort to comply with the statutes and that its acts in that behalf were a substantial compliance. Further—that if the acts of appellee are held to be a non-compliance, yet the contract it made with the bankrupt was not void but voidable at most and the other party thereto, after receiving

the benefits of appellee's services, cannot repudiate the same and avoid payment as per its terms.

The contracting parties were both foreign corporations, and, as stated by the District Judge in his opinion (Rec. p. 30) the section of the statute under consideration (660) only makes void contracts between non-complying foreign corporations and "*citizens of the district*"—that is, with citizens of the District of Alaska.

That is not a new or narrow construction of such a provision. It is the intent of the legislature plainly stated.

"Sometimes the statute applies in terms to contracts of a foreign corporation *with citizens only*, and does not render void or unenforceable contracts between foreign corporations and persons who are not citizens of the state." 19 Cyc. 1291.

The Statute of Arkansas provides in part:

"If such corporation shall fail to file such certificate, all its contracts *with citizens of this state* shall be void as to it and shall not be enforced in its favor by the courts."

And upon a question presented to the Supreme Court of that State it was held:

"The sole object of the act as shown by these provisions, is the protection of the citizen. The contracts affected by it are made with him, and, if entered into in violation of the statute, are void as to the corporation, and no one else. Contracts between foreign corporations and persons who are not citizens are under no circumstances declared void as to any one."

St. L. A. & T. R. Co. vs. Fire Assn. of Philadelphia, 60 Ark. 325; 30 S. W. 350; 28 L. R. A. 83.

Section 657 of the Compiled Laws of Alaska provides that failure to file the required documents shall make voidable all contracts made by the defaulting corporation with any party, at the option of such party. It follows then that, at most, the logging contract made between the two Washington corporations was voidable at the election of the bankrupt corporation.

This brings us to the consideration of the point raised by the trustee that he takes any and all rights of the bankrupt and could elect not to be bound by the contract under consideration.

The voiding of a voidable contract is rescission.

“A party, to accomplish an adverse rescission must return to the non-consenting party what will place him in statu quo. The party rescinding must return the consideration or whatever else he received under the contract, and otherwise do what will put him and the other party in statu quo, as already explained; and if he cannot do this—as, if he has derived from the contract some benefit not of a sort to be refunded—he cannot rescind.” Bishop on Contracts. Sections 818-833.

rupt, cannot now say—“I have received the logs cut under the contract and sawed most of them into lumber, much of which I have sold and pocketed the proceeds therefrom. The contract is voidable and I now elect to avoid it. I cannot return the

services you rendered nor the 4,000,000 feet of logs and I do not have to even pay you the price of the services because your claim, upon my election to hold the contract void, is not provable in bankruptcy." The mere statement of the proposition refutes its correctness.

Counsel for the trustee in his brief cites two texts, Brandenburg and Loveland, on Bankruptcy. Both citations treat of the subject of *illegal contracts*. There is no denying that a claim cannot be founded upon an illegal contract. The following language from Loveland (p. 636) is the only seemingly pertinent paragraph in the citations mentioned:

"Where a foreign corporation is "doing business *in Pennsylvania*, it can not prove claims upon contracts unless it has complied with the statute with respect to registration."

By putting emphasis on the words "in Pennsylvania" we see that it is not a general principle of law that Loveland has recorded. On turning to the Pennsylvania statute the paragraph is readily understood.

"It shall not be lawful for any corporation to do any business in this commonwealth, until it shall have filed in the office of the Secretary of the commonwealth * *"

The same is true of the cases cited by counsel for the Trustee. Two of them (*In re Montello Brick Works*, 163 Fed. 621 and *Buffalo Ref. Mach. Co., vs. Penn. H. & P. Co.*, 178 Fed. 696) depend

upon the Pennsylvania statute above referred to and two are based upon the Oregon and Missouri Statutes which are, in effect, very similar.

Oregon.—“ * in default thereof (filing declaration etc.) it (the non-complying foreign corporation) shall not be entitled to transact any business within this state or maintain any suit, action, or proceeding in its courts.” (*La Moine L. & T. Co. vs. Kesterson*, 171 Fed. 980.)

Missouri.—“In addition to which, (fine of \$1000.00) on or after the going into effect of this act, no foreign corporation as above defined, which shall fail to comply with this act, can maintain any suit or action, either legal or equitable, in any of the courts of this state, upon any demand, whether arising out of contract or tort;” (*Tri-State Amusement Co. vs. Forest Park H. A. Co.*, 90 S. W. 1020.)

This, we believe, disposes of appellant's contention. It would seem clear:—

First.—That the failure of the trustee to appeal within the time allowed by law from the order of the District Court reversing the order of the Referee disallowing the claim of the appellee herein, is conclusive of this appeal.

Second.—That on the merits the appellee's claim should be allowed, as, based upon a contract not with a citizen of the District, it was not void but voidable, at most, and the trustee, from the nature of the contract, cannot now elect to avoid the same because he cannot place the parties in statu quo.

For these reasons we respectfully urge this honorable Court to affirm the order of the District Court affirming the order of the Referee in Bankruptcy allowing appellee's claim.

Respectfully submitted,

RODEN & DAWES,

Attorneys for Appellee.

